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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALEJANDRO MENDEZ,

Defendant and Appellant.

H043244

(Santa Clara County

Super. Ct. No. C1365858)

Pursuant to a plea agreement, defendant Jose Alejandro Mendez pleaded no contest to one felony count of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b))<sup>1</sup> and admitted two related enhancements: (1) he personally used a firearm in the commission of that offense (§ 12022.5, subd. (a)); and (2) he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(B)). As part of the plea agreement, the People agreed to dismiss a felony charge of attempted murder (§ 187) along with related enhancements.<sup>2</sup> In exchange for his plea, Mendez was to receive a determinate sentence of 24 years in state prison.

At his initial sentencing hearing, Mendez appeared with new counsel who advised the court Mendez intended to file a motion to withdraw his plea. The hearing on that

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<sup>1</sup> Unspecified statutory references are to the Penal Code.

<sup>2</sup> The enhancements were for personal use of a firearm in committing attempted murder (§ 12022.53, subs. (b), (c)) and that Mendez committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). In addition, it was alleged that Mendez, a minor, was over the age of 16 at the time of the commission of the offense within the meaning of Welfare and Institutions Code section 707, subdivisions (b) and (d)(1).

motion was held on December 7, 8, and 17, 2015. On January 7, 2016, the trial court denied the motion to withdraw the plea and sentenced Mendez to an aggregate term of 24 years, consisting of the upper term of nine years on the charge of assault with a semiautomatic firearm, a consecutive five year term for the gang enhancement and a consecutive 10 year term for personal use of a firearm. Mendez was awarded total credits of 960 days, consisting of 835 days of custody credits and 125 days of credit pursuant to section 2933.1. The trial court imposed a restitution fund fine of \$6,720 (§ 1202.4, subd. (b)(2)). An additional restitution fund fine in the same amount was imposed but suspended. (§§ 1202.4, 1202.45.) The court ordered victim restitution in the amount of \$937.60, a court security fee of \$40 (§ 1465.8), a criminal conviction assessment of \$30 (Gov. Code, § 70373), and a criminal justice administrative fee of \$129.75 (*id.*, §§ 29550, 29550.1, 29550.2).

Mendez appealed and obtained a certificate of probable cause from the trial court.

We appointed counsel to represent Mendez in this court. Appointed counsel filed an opening brief which states the case and the facts, but raises no specific issues. We notified Mendez of his right to submit written argument in his own behalf within 30 days. That period has elapsed, and we have received no written argument from Mendez.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

We provide a brief description of the facts and procedural history of the case. (*People v. Kelly* (2006) 40 Cal.4th 106, 124.)

Mendez got into a verbal altercation with two men, both Norteño gang members, on a residential street corner in San Jose. A man driving a truck near the intersection and a passing police officer saw Mendez, armed with a gun, run toward the two Norteños and fire a single shot at them as they ran away. After police apprehended Mendez, the two Norteños approached him and began yelling at him, asserting their gang affiliation. Mendez asserted he was a Sureño, calling out, “Williams Street, bitch,” which was a reference to his Sureño subset. Mendez was found in possession of a firearm, which

contained seven unfired rounds. The bullet Mendez fired was found near the garage of one of the Norteños.

Prior to accepting the plea offer, Mendez was allowed to meet with his mother to discuss the deal, and he subsequently signed and initialed the waiver form. At the plea hearing, Mendez confirmed that he had discussed the form with his attorney and had sufficient time to review it before signing. In response to the trial court restating his rights during the oral plea colloquy, Mendez indicated he understood those rights and waived them on the record.

At the subsequent hearing to withdraw his plea, Mendez testified he currently was and had been a Sureño since he was 11 years old. He also said he had little to no knowledge of the legal system and had not completed high school. He had previously been assaulted by Norteño gang members and had started carrying a gun for self-protection.

The two men who approached him the day of the incident were both larger than him and they yelled “Norte,” which he felt disrespected his Sureño gang. He only fired at them once because he was afraid they might have guns, not because of their gang affiliation. He admitted he called out “Williams Street,” referring to his gang, when the two men confronted him after he was arrested. He also admitted the men were running away from him when he fired and he did not see any weapons on them.

Mendez testified he pulled the trigger by accident, though he never said that to the police. He also admitted he did not make that claim in the signed declaration he submitted in support of the motion to withdraw his plea.

According to Mendez, his privately-retained trial counsel, Michael Hingle, only met with him a few times while the case was pending for no more than 15 minutes at a time. He never understood what Hingle told him about the case nor did he understand any of his rights. Hingle read him the waiver form and showed him where to initial and sign, but he did not understand the form. When the judge advised him of his rights on the

record, asking if he understood and waived them, Hingle whispered in his ear and told him to say “yes.” Mendez only signed the waiver form and entered the plea because he was afraid he would get a life sentence.

Hingle testified<sup>3</sup> he met with Mendez at juvenile hall 10 times, as well as at every hearing. The length of the meetings varied, with some brief meetings lasting five to 10 minutes while others lasted 30 to 40 minutes. He discussed all aspects of the case with Mendez and gave him copies of all the documents, including police reports, he received from the district attorney.

When the district attorney offered a determinate sentence of 24 years, Hingle believed it was the best possible deal he could negotiate for Mendez, especially since Mendez, who was still a juvenile, would be eligible for parole in 15 years. Otherwise, Mendez was facing a possible life term.

Hingle gave Mendez the waiver form and Mendez read it to himself, and they discussed certain parts of it. Hingle went over his rights, and the only question he could recall Mendez asking was about the length of the sentence.

Hingle denied whispering in Mendez’s ear during the plea colloquy with the court and he believed Mendez understood the advisement of rights given to him by the sentencing judge.

The trial court denied the motion to withdraw the plea.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *People v. Kelly, supra*, 40 Cal.4th 106, we have reviewed the whole record and have concluded there is no arguable issue on appeal.

## **II. DISPOSITION**

The judgment is affirmed.

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<sup>3</sup> Prior to Hingle testifying at the hearing on the motion to withdraw the plea, Mendez waived his attorney-client privilege with respect to his communications with Hingle.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.